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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO PADILLA,

Defendant and Appellant.

F056829

(Super. Ct. No. DF008898A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Louis P. Etcheverry, Judge.

Mark Shenfield, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lloyd G. Carter and Leanne L. LeMon, Deputy Attorneys General, for Plaintiff and Respondent.

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On September 23, 2008, appellant Francisco Padilla was convicted by a jury of second degree robbery committed for the benefit of or in association with a criminal

street gang (Pen. Code,[1] §§ 186.22, subd. (b)(1), 212.5, subd. (c); count 1) and active participation in a criminal street gang (§ 186.22, subd. (a); count 2). His motion for a new trial was denied. On January 6, 2009, imposition of sentence was suspended, and appellant was placed on probation for five years on condition, inter alia, that he serve one year in jail, pay various fees, fines, and restitution, and not associate with any persons known to him to be criminal street gang members. Appellant filed a notice of appeal the same day.

On May 5, 2009, appellant was arraigned on violation of probation. On June 18, 2009, following a contested hearing, probation was revoked for violation of the gang-association provision. On August 6, 2009, appellant was sentenced to prison for 12 years, calculated as the lower term of two years for the robbery plus 10 years for the section 186.22, subdivision (b)(1) enhancement, and was ordered to pay various fees and fines. Insofar as the record shows, no separate notice of appeal was filed.

Appellant now attacks his convictions upon a number of grounds and also contends he should be resentenced. For the reasons that follow, we will affirm the convictions, but remand the matter for resentencing.

FACTS[2]

I

PROSECUTION EVIDENCE

At around 7:00 p.m. on April 10, 2008, 16-year-old Edward S., his younger sister, and his 10-year-old cousin, Angel, were riding their bicycles and scooters home from

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1 All statutory references are to the Penal Code unless otherwise stated.

2 We summarize here the evidence adduced at trial. Facts pertinent to the violation of probation will be set out as relevant to appellant's claim of sentencing error, discussed *post*.

Morningside Park in Delano, where the younger children had been playing. Edward's bicycle was red and he had spent around $1,500 on it over the course of several years.

The youngsters were headed south on Browning when a green car passed them. The car contained three males and two females. Some of the passengers kept looking back as they passed. When the car was about a hundred feet away, it made a U-turn and pulled up next to Edward's group. The front and rear passengers got out, and the driver stood by the door. The passengers told Edward to get off his bicycle. Edward said he was not a gang member, but they said they did not care. The front passenger, whom Edward identified at trial as appellant, stepped up to Edward and pushed him off the bicycle. This caused Edward to trip over his sister's bicycle, which made the little girl fall. The back passenger then grabbed Edward's bicycle and threw it in the trunk of the car.

Edward knew the people in the car were gang members, because one of them called him "Ese." As they were leaving, they said, "remember it is Southside Delano" and "that's right, remember Southside Delano." During his freshman year in high school, Edward "hung out" with a group of Nortenos, but he was not a part of anything to do with gangs on the day of the robbery.

Edward's parents pulled up about 15 or 20 seconds after the other vehicle left. They arrived so quickly because, when Edward saw the car make a U-turn, he telephoned them and said he thought he was going to "get jumped." As a result, his mother called the police. When she and her husband arrived at Edward's location, Edward was crying and upset. Edward and his father tried unsuccessfully to locate the other car, then went home.

When Edward arrived home, police officers were there. Edward described the front passenger as being 17 or 18 years old, a little taller than Edward's height of about five feet six inches, 150 to 160 pounds, Mexican, with short dark hair, clean-cut and clean-shaven, and wearing a solid white T-shirt with dark blue or black pants. At trial,

Edward testified he did not remember any facial hair; the robber did not have a goatee. Edward described the back passenger to police as Mexican, about 15 years old, skinny, and shorter than Edward. Edward also described his clothes. Officer Wilson obtained these descriptions within about 15 minutes of the incident.

After the officers left, Edward's mother had the three children look through the yearbook for Delano High School, which Edward and his older brother attended. Edward looked at all the photographs. Angel was with him while he was doing this. When Edward did not see anyone that he recognized from the incident, his mother contacted some family members, and her nephew brought over his girlfriend's yearbook from Cesar Chavez High School. Edward again looked through all of the pictures. His younger sister and Angel were with him. When Edward reached the sophomores, he recognized appellant's photograph. He was 100 percent certain it was the person who pushed him off his bicycle, and he told his mother. Angel saw Edward pick out appellant's photograph. Angel and Edward's little sister both looked at the picture.

After Edward saw the photograph in the yearbook, he contacted Officer Wilson, who returned to the house. This was a couple of hours after the robbery. On April 11, Edward was shown a group of photographs by Officer Wilson. Edward identified appellant's photograph.

Angel recalled one of the males in the car pushing Edward and saying "something Ese" or something like that. When Angel spoke to Officer Wilson right after the robbery, he said he could not identify anyone.[3] Angel looked in the yearbooks. At first he testified that he did not see anyone he recognized; then he testified that he did recognize someone, and that it was the same person who was in the photographs shown him by the officer. This was appellant. Angel did not really look at him at the time of the robbery, because he left to get help. He saw appellant's face "[a] little bit" when appellant got out

[3] Edward's little sister also told Wilson she could not identify anyone.

of the car, enough to recognize him "a little bit" when Officer Wilson showed him some pictures the next day. Angel remembered the dimple.[4] Appellant was the person who got out of the back seat of the car. He was wearing a shirt with black and white stripes over a white T-shirt. He had short, sort of black hair. Angel did not remember whether he had a goatee or mustache. He did not have a beard.

Officer Wilson contacted and arrested appellant on April 11, a few hours after the incident. Appellant was wearing a blue belt with a silver buckle with an S inlaid on the buckle. He did not have what Wilson considered to be a goatee.[5] Wilson searched appellant's house. He did not find anything connected to a stolen bicycle. He did not recall finding anything gang-related.

The parties stipulated that Surenos are a criminal street gang. Delano Police Detective Nicholson, who testified as an expert on gangs, explained that Surenos and Nortenos are longtime rivals. Delano is predominantly in Northern gang territory, but there are pockets of Surenos in the city. Surenos identify with blue and Nortenos with red.

Nicholson had never come into personal contact with appellant, but reviewed police reports concerning appellant's past history and the present case, police reports and booking photographs of people in whose presence appellant had been during police contacts, field investigation cards, and photographs. Based on this information and his training and experience, Nicholson formed the opinion that on April 10, 2008, appellant was a member of the Sureno criminal street gang. When asked a hypothetical question based on the facts of this case as shown by the prosecution's evidence, Nicholson opined

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4 Photographs admitted into evidence at trial, some of which we have viewed, show appellant with a dimple or indentation in the center of his chin.

5 The jailer described appellant's appearance, as of April 11, as "unkept," and listed him as having a goatee.

that the crime was committed for the benefit of the Sureno gang. Nicholson explained that the crime was committed in a public place where the victims and other people were present. As the suspects were leaving, they shouted, "'Delano Southside,'" thus portraying to the public that Delano Southside is a gang that should not be "mess[ed] with." This raises the status of the gang and also instills fear into the community. At the same time, it shows the suspected rival gang member that Delano Southside is not to be messed with. It could also benefit the gang by preventing citizens of the surrounding area from calling the police or testifying against the suspects, because the community has seen the level of violence that the gang is capable of, without trying to be discreet, by committing the crime in broad daylight. The notoriety the gang members gain from committing crimes and, further, from committing a crime against a person riding a bicycle that is painted a rival gang's color, raises the status of the gang members within the community, within the gang, and with rival gang members. The reason they shouted "'Delano Southside'" was to promote the gang, the same way an advertisement would promote a business.

II

DEFENSE EVIDENCE

Dr. Robert Shomer, an expert on eyewitness identification, testified that scientific research has shown eyewitness identification to be the least reliable means of identification and the largest source of erroneous convictions. Overall, it works "at about like the level of flipping a coin or less."

Shomer explained that many factors are involved in the accuracy of eyewitness identification. Stress makes people less accurate. If the stressful interaction happened suddenly at dusk, involved more than one person, and the victim was concerned with protecting others, these factors would "very significantly" reduce the accuracy of identifying the persons involved.

When someone looks at a photograph, he or she can incorporate the memory of that photograph into his or her memory of what he or she initially saw. This is one of the problems with looking at a lot of pictures: The person incorporates a lot of information and the accuracy goes down because things blur. There is also a phenomenon called "source confusion." This describes a situation in which a face looks familiar to a person, but he or she is inaccurate in attributing the source of that familiarity. For instance, a person may have an interaction with someone at work or in the neighborhood. If he or she subsequently is shown a picture of that individual, there may be a sense of familiarity even if the interaction is not remembered. The person may incorrectly assume the sense of familiarity comes from having seen the other person at the scene of a crime. In addition, many people resemble each other. If a person gets a glimpse of the culprit, someone in photographs may resemble the culprit, but resemblance is not identity.

In viewing someone assumed to be the culprit, the look of that person can become incorporated into the witness's memory. The initial description given of the suspect safeguards against that. Discrepancies between the initial description and the person identified are very important. If the suspect is described as being clean-shaven and the person selected has a goatee, this is a major discrepancy that has to be weighed. In viewing appellant's booking photograph, Shomer felt that appellant had a goatee, and that it was readily distinguishable as a goatee, assuming a scene in which the person's face could be seen. If the lighting was so poor that one could not say whether the person had a goatee, that fact alone would affect the accuracy of any identification.

Identification procedures are associated with mistaken identity. There must be a representation of what is in the memory of the witness and not something that suggests the answer. A six-photo array is a typical procedure. If someone is repeated from a prior identification procedure, a photo array is essentially worthless. Otherwise, if done correctly with pictures that are all the same size and same head pose and with the same background color, it is a fair test of someone's ability to identify. If any one of those

guidelines is not met, the test is no longer fair or valid. Depending on the way the test is conducted, anyone can be identified as a culprit. Giving a person an admonition that the person may or may not be there, and making sure the person understands the admonition, is important.

Shomer was posed a hypothetical question in which, after the robbery occurred, the witnesses went through first one yearbook and then another before one of them identified appellant. Shomer found this "almost akin to walking down the street and picking somebody." The procedure had no reliability or validity. Almost by probability, if a lot of photographs are viewed, there will be somebody who resembles the person actually seen; and the more pictures looked at, the more accuracy diminishes because of the incorporation issue. Moreover, if another witness is present when the first witness identifies a person, it eliminates the ability to know whether the second witness's identification is due to what he or she actually remembers. The chances of error under the described circumstances were "massive." Moreover, once the misidentification was made, it would then affect further identification procedures involving the same suspect. Once a mistake in identification is made, the person who made the identification will cling to his or her original conclusion and continue to make the mistaken identification.

The photographic lineups in this case were "irrelevant" as far as having someone demonstrate an ability to identify, because they contained one person already identified out of a yearbook. These arrays essentially reinforced the notion that the person identified must have been the right person. Even without the prior identification, there were "massive problems" with the arrays because the backgrounds were not the same in the photographs.

Shomer explained that there is no correlation between the certainty or confidence with which an identification is made and the accuracy of that identification. Moreover, as time passes, people become more confident, even though the actual contents of their

memories are decaying. Thus, they become more confident of things about which they are less accurate.

Daniel Santiago was appellant's uncle. Approximately three years before trial, he and appellant came into contact with Edward when Edward and Santiago had a minor disagreement concerning Edward's dog.[6]

Appellant was employed at the Vallarta Market in Delano from August 27, 2007 to December 5, 2007. It is one of the main markets in the area. Appellant originally was a courtesy clerk, a position through which he had a lot of interaction with customers.

Norma Cerecer, appellant's mother, was at home on April 11 when Officer Wilson came to the house, looking for appellant. Cerecer told him that appellant was at the home of his girlfriend, Veronica Avila, in McFarland; Cerecer had dropped him off there around 4:00 p.m. on April 10. She telephoned Avila's house in Wilson's presence, asked to speak to appellant, and told appellant to come home, that the police were at the house.[7] Avila's relative, Gloria, gave him a ride home. While waiting for appellant to arrive, Wilson searched the house with Cerecer's permission.

Cerecer's late father's name was Jose Santiago. Appellant used the name Santiago from time to time and had a belt with an S on it. Jose Santiago was in a wheelchair toward the end of his life. Appellant would push him around the neighborhood.

Veronica Avila was appellant's girlfriend, both at the time he was arrested and as of trial. Appellant, who was arrested early Friday morning, arrived at her house around 4:00 p.m. on Thursday. They stayed at her house the entire time.[8] Appellant left around midnight. Avila's cousin, Gloria, took him home.

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6 Edward denied ever seeing appellant before the robbery and did not recall any incident involving a dog.

7 According to Wilson, Cerecer simply told him that appellant was out. She said she did not know exactly where he was.

8 Avila's brothers confirmed that appellant was at the house the entire time.

DISCUSSION

I

EYEWITNESS IDENTIFICATION ISSUES

A. Suggestive Procedures and Unreliable Identifications

1. Background

Appellant moved, in limine, to exclude the photographic lineup identifications as unduly suggestive and, hence, a violation of due process, because (1) Edward and Angel had already seen his picture in a yearbook, and (2) his photograph in the array was brighter than the others and the only one with a blue background. The trial court found the array to be "sufficiently neutral" and not "unnecessarily suggestive" in light of the written admonition advising the witness not to be influenced by the fact that some of the persons in the photographs had beards, mustaches, or long hair, or by the fact that some of the pictures might be in color while others were black and white. Accordingly, it denied the motion.

Appellant now contends the photographic lineups were unduly suggestive because (1) they resulted from the yearbook identifications, which were made under uncontrolled circumstances, could have been the result of source confusion, resulted in Edward viewing appellant's photograph multiple times, and during the course of which Angel was with Edward when Edward made an identification; (2) only appellant and possibly one other individual depicted in the photographs met Edward's description of the perpetrator as clean-cut and clean-shaven; and (3) appellant's photograph was crisper and cleaner than the others, and was the only one with a blue background. Appellant further says the identifications were unreliable under the totality of the circumstances.[9]

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[9] In support of his arguments, appellant cites multiple times to the Final Report of the California Commission on the Fair Administration of Justice. In a footnote in his opening brief, he says that, pursuant to Evidence Code sections 452 and 459, we have

2. Analysis

"'[A] violation of due process occurs if a pretrial identification procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." [Citations.]'" (*People v. Sanders* (1990) 51 Cal.3d 471, 508; *Simmons v. United States* (1968) 390 U.S. 377, 384.) A "defendant's protection against suggestive identification procedures encompasses not only the right to avoid methods that suggest the initial identification, but as well the right to avoid having suggestive methods transform a selection that was only tentative into one that is positively certain. [Citation.] While a witness is entitled to become surer of an identification, due process precludes the generation of that increased certainty through a suggestive [identification procedure]. [Citations.]" (*Raheem v. Kelly* (2d Cir. 2001) 257 F.3d 122, 135.)

"'The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior

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authority to take judicial notice of the fact the report was made and of its contents. (See *Shaeffer v. State of California* (1970) 3 Cal.App.3d 348, 354.) Assuming appellant is requesting that we take judicial notice of the report, we decline to do so for two reasons. First, rule 8.252(a)(1) of the California Rules of Court states that, "[t]o obtain judicial notice by a reviewing court under Evidence Code section 459, a party must serve and file a separate motion with a proposed order." Appellant has not done so, nor has he served and filed a copy of the report. (Cal. Rules of Court, rule 8.252(a)(3).) Second, although Shomer mentioned the commission in his testimony, nothing in the record suggests the report itself was presented to the trial court. "'Reviewing courts generally do not take judicial notice of evidence not presented to the trial court' absent exceptional circumstances. [Citation.]" (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 379, fn. 2; see also *People v. Tate* (2010) 49 Cal.4th 635, 672, fn. 21.) Moreover, even if we were to take judicial notice, doing so would not establish the truth of the report's contents. (*People v. Castillo* (2010) 49 Cal.4th 145, 157; see *People v. Moore* (1997) 59 Cal.App.4th 168, 178; *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564-1565.)

description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation [citation]. If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 412; see *Manson v. Brathwaite* (1977) 432 U.S. 98, 104-107, 114; *Neil v. Biggers* (1972) 409 U.S. 188, 199-200; *Stovall v. Denno* (1967) 388 U.S. 293, 302, overruled on another ground in *Griffith v. Kentucky* (1987) 479 U.S. 314, 320-323, 327.)

"'Due process requires the exclusion of identification testimony only if the identification procedures used were unnecessarily suggestive and, if so, the resulting identification was also unreliable.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 698.) "In other words, '[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends.' [Citation.]" (*People v. Ochoa, supra,* 19 Cal.4th at p. 412.) The defendant bears the burden of demonstrating "'that the identification procedure resulted in such unfairness that it abridged his rights to due process. [Citation.]' [Citations.]" (*People v. Sanders, supra,* 51 Cal.3d at p. 508.) The defendant must show that the procedure was both unduly suggestive and unfair "'as a demonstrable reality, not just speculation.' [Citation.]" (*People v. Cook* (2007) 40 Cal.4th 1334, 1355.) "We review deferentially the trial court's findings of historical fact, especially those that turn on credibility determinations, but we independently review the trial court's ruling regarding whether, under those facts, a pretrial identification procedure was unduly suggestive." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 943; *People v. Kennedy* (2005) 36 Cal.4th 595, 608-609, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

Turning first to Edward's selection of appellant's yearbook photograph, it is clear that Edward's mother, not the police, instigated the identification procedure. In *Colorado v. Connelly* (1986) 479 U.S. 157 (*Connelly*), the United States Supreme Court observed that "settled law" requires "some sort of 'state action' to support a claim of violation of

the Due Process Clause of the Fourteenth Amendment." (*Connelly*, *supra*, at p. 165.) The high court stated: "The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause. [Citations.]" (*Id*. at p. 166.)

However, *Connelly* involved the admission at trial of a defendant's confession, and included a discussion of whether excluding the defendant's statements, where there was no wrongful police conduct, would substantially deter future violations of the Constitution. (*Connelly, supra,* 479 U.S. at pp. 165-166.) There is a split of authority as to whether, in the identification context, some sort of state action is required before constitutional due process rights can be implicated. One line of cases rejects *Connelly*'s application, either explicitly or by implication, reasoning: "The due process focus, in the identification context, is principally on the fairness of the trial, rather than on the conduct of the police, for a suggestive procedure 'does not in itself intrude upon a constitutionally protected interest.' [Citation.] Such procedures are disapproved 'because they increase the likelihood of misidentification,' and it is the admission of testimony carrying such a 'likelihood of misidentification which violates a defendant's right to due process.' [Citation.] '[I]t follows that … courts should scrutinize all suggestive identification procedures, not just those orchestrated by the police, to determine if they would sufficiently taint the trial so as to deprive the defendant of due process.' [Citation.] The linchpin of admissibility, therefore, is not whether the identification testimony was procured by law enforcement officers, as contrasted with civilians, but whether the identification is reliable. [Citations.]" (*Dunnigan v. Keane* (2d Cir. 1998) 137 F.3d 117, 128; accord, *United States v. Bouthot* (1st Cir. 1989) 878 F.2d 1506, 1514-1516; *Thigpen v. Cory* (6th Cir. 1986) 804 F.2d 893, 895; *Green v. Loggins* (9th Cir. 1980) 614 F.2d 219, 222.) The other line of cases requires state action, reasoning that the seminal United States Supreme Court cases "left undisturbed that fundamental principle which holds that pretrial identification or recognition of an accused by a witness in the absence of

participation by the police or prosecution does not bring such identification within the ambit of the due process principles set forth in *Manson v. Brathwaite*, *supra*, [432 U.S. 98]. Thus, absent an affirmative showing that a pretrial identification involved unlawful conduct on the part of state officials, the due process safeguards of *Manson v. Brathwaite*, *supra*, are not implicated …." (*Sheffield v. United States* (D.C. 1979) 397 A.2d 963, 966-967; accord, *United States v. Zeiler* (3d Cir. 1972) 470 F.2d 717, 720; *State v. Reid* (Tenn. 2002) 91 S.W.3d 247, 272-273 & cases cited.) Under this reasoning, which has been described as "the rule adopted by a majority of jurisdictions that have considered this issue," (*State v. Reid*, *supra*, at p. 272), a defendant's due process rights are adequately protected by the opportunity for cross-examination to expose the witness's lack of credibility or shortcomings in his or her identification (*id*. at pp. 272-273). "'This opportunity is further buttressed and enforced by the requirement that the state prove every element of the crime, including the identity of the accused beyond a reasonable doubt. The guarantee is also supported not only by the requirement of a unanimous jury verdict but also by the power of the trial justice to review the evidence … on a motion for new trial.'" (*Id*. at p. 273.)

California courts appear to have assumed that some sort of state action is required. (See, e.g., *People v. Ochoa*, *supra*, 19 Cal.4th at p. 413; *People v. Boyd* (1990) 222 Cal.App.3d 541, 574; *People v. Boothe* (1977) 65 Cal.App.3d 685, 691.) With respect to Edward's perusal of the yearbooks, not only did the *state* not improperly suggest anything, the procedure, in and of itself, did not suggest anything or somehow cause appellant's photograph to stand out from the others in a way that suggested Edward should select it. (See *People v. Avila*, *supra*, 46 Cal.4th at p. 698.) Thus, we need not resolve the need for state action, but instead consider the yearbook procedure in terms of its potential effect on Edward's (and Angel's) subsequent identifications of appellant. As stated by the Court of Appeal in *In re Anthony T.* (1980) 112 Cal.App.3d 92, 98, "if appellant was wrongfully identified and convicted it matters not to him whether the

injustice was due to the actions of the private citizens or the police; the injury to him is the same. [Citation.]"

Angel's identification of appellant need not detain us. Angel's testimony was often self-contradictory and unclear, as might be expected based on his young age. He initially testified that he did not see the person who pushed Edward, and that he did not see anyone in the yearbook whom he recognized. When shown the photographic array by the police, however, he recognized someone because, when the person got out of the car, Angel saw his face "[a] little bit." Angel specifically remembered the dimple. With respect to looking through the yearbook, Angel testified that he was sitting right next to Edward, but did not think he was paying attention when Edward pointed someone out, but then Angel realized it was the person. When asked by defense counsel if he identified the person in the photographic lineup because it was the person Edward had picked out, Angel said no, that he kind of recognized the person when he saw the photograph. At first he did not really know, but he was pretty sure it was the person. Defense counsel then asked, "Were you pretty sure because that's the guy Edward had picked out of the yearbook?" Angel responded, "Yes."

"A joint confrontation is a disapproved identification procedure. [Citations.]" (*United States v. Bagley* (9th Cir. 1985) 772 F.2d 482, 494.) The reasons this is so were placed before the jury through Shomer's testimony, and through the testimony of Officer Wilson. Jurors were able to assess the bases for, and validity of, Angel's identification of appellant, including the fact he recalled the dimpling of the chin. (See *People v. Arias* (1996) 13 Cal.4th 92, 169-170 [witness's recollection and use of distinctive aspect of perpetrator's appearance enhances inference photo identification was accurate].) Assuming Angel's identifications were tainted, flaws in his identifications cannot have adversely affected Edward's identifications of appellant (see *Monteiro v. Picard* (1st Cir. 1971) 443 F.2d 311, 312-313), and, given the nature and substance of Angel's testimony,

there is no basis on which to conclude it would likely have significantly bolstered Edward's credibility in the eyes of the jury.

Turning to Edward's identifications, he selected appellant's photograph from the yearbook within about an hour after the incident. The photograph, which we have viewed, was quite small and was from the 2006 yearbook. Thus, it is not surprising that Officer Wilson wanted to see if Edward could make an identification from an array containing a larger, different, and possibly more recent photograph.[10] That Edward viewed a photograph of appellant more than once does not mean the identification procedures were impermissibly suggestive. (See *People v. Johnson* (2010) 183 Cal.App.4th 253, 272; *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1082.)

Appellant complains about the composition of the photographic lineup. He says that only he and one other individual met Edward's description of the robber as clean-cut and clean-shaven, as the other photographs depicted individuals with earrings or mustaches, and that his was the only photograph that was crisp and clean and had a blue background.

We are unwilling to say, in this day and age, that earrings – especially the small studs visible in two of the photographs contained in the array shown to Edward, which we have viewed – are inconsistent with a description of a male as clean-cut. This is especially true in light of Edward's explanation, at trial, that "clean-cut" meant to him that the person had no visible tattoos and was wearing everyday clothing.

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10 We assume the photograph in the array was more recent than the one in the yearbook. The pictures definitely are not identical. Wilson testified that when creating a photographic lineup, the suspect's name in entered into the police department's computer system. Wilson will usually use the latest photograph available. Based on information concerning height, weight, ethnicity, facial hair, and the like, the computer will display photographs of individuals meeting the criteria. In this case, the computer showed six or nine photographs, and Wilson used a mouse to drag the ones he wanted onto the lineup form. When doing so, he was not concerned with the color of the background of the photograph, but rather with the individual's face and hairstyle.

In any event, "[t]o determine whether a procedure is unduly suggestive, we ask 'whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him' [Citations.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 124.) In the present case, all six color photographs are the same size and show the individual from about the same distance. All are young men of approximately the same age, complexion, and build; all are or could be Hispanic, and all have short dark hair and dark eyes. A couple have some hair on their upper lips, although nothing so heavy we would characterize it as a mustache. None is wearing distinctive clothing, although appellant appears to be the only one wearing dark blue. Appellant's photograph is the brightest of the six, and is the only one with a blue, as opposed to off-white or gray, background.

Minor differences in facial hair, hair style, background color, and image size or discoloration do not make a lineup suggestive. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1217; see *People v. Holt* (1972) 28 Cal.App.3d 343, 350, disapproved on another ground in *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625, fn. 6.) Similarly, a lineup is not made suggestive by the fact the defendant is the only participant wearing a certain type of clothing, at least where, as here, the clothing is neither distinctive nor does it match important elements of the description provided by the witness. (See *Foster v. California* (1969) 394 U.S. 440, 442-443; *People v. Gonzalez, supra,* 38 Cal.4th at pp. 943-944; *People v. Carter* (2005) 36 Cal.4th 1114, 1162-1163; *People v. Johnson, supra,* 3 Cal.4th at p. 1217; *Raheem v. Kelly, supra,* 257 F.3d at pp. 134-135.) We conclude that the minor differences here are properly categorized as "trivial distinctions [that] are immaterial. [Citation.]" (*People v. Carter, supra,* 36 Cal.4th at p. 1163; see, e.g., *People v. Gonzalez, supra,* 38 Cal.4th at p. 943; *People v. Johnson, supra,* 3 Cal.4th at p. 1217.) This is especially true in light of the admonition Officer Wilson testified that he gave to Edward and paraphrased for Angel. In pertinent part, the admonition warned against being influenced by the fact some of the persons in the photographs had beards,

mustaches, or long hair, or that some of the pictures might be in color while others were black and white, and also stated that the witness was not under any obligation to identify anyone.[11]

We conclude that the procedures resulting in Edward's identifications of appellant were not impermissibly suggestive. Accordingly, "'our inquiry into the due process claim ends.' [Citation.]" (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 412.) The jury was properly allowed to hear his identification testimony, and to evaluate it in light of the weaknesses that were effectively highlighted through cross-examination and Shomer's testimony.[12]

B. Sufficiency of the Evidence

Appellant contends the evidence was insufficient to sustain his robbery conviction because the identification testimony – the only evidence that linked him to the crime – was inherently improbable. Since the prosecution relied on the robbery to prove an element of the charge of active participation in a criminal street gang, he further says, his conviction on that charge necessarily also falls.[13]

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[11] Appellant points out that all of the pictures were in color; hence, he says, the admonition does not dissipate the suggestiveness of appellant's photo being the only one with a blue background. We disagree. The clear gist of the admonition was that the witness should not be influenced by such extraneous factors.

[12] Because appellant has failed to meet his burden of establishing that the identification procedures used here were unduly suggestive, we need not reach the question "'whether the identification was nevertheless reliable under the totality of the circumstances.' [Citations.]" (*People v. Carter, supra,* 36 Cal.4th at p. 1164.) We will, however, discuss the significance of appellant's booking photograph in conjunction with his claim of insufficiency of the evidence, *post.*

[13] The elements of the substantive offense defined in section 186.22, subdivision (a), with which appellant was charged in count 2, are actively participating in a criminal street gang with knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity, and willfully promoting, furthering, or assisting in any felonious criminal conduct by members of the gang. (*People v. Lamas* (2007) 42 Cal.4th 516, 523; *People v. Robles* (2000) 23 Cal.4th 1106, 1115.)

The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is "reasonable, credible, and of solid value." (*People v. Johnson*, *supra*, at p. 578.) An appellate court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367). "Where the circumstances support the trier of fact's finding of guilt, an appellate court cannot reverse merely because it believes the evidence is reasonably reconciled with the defendant's innocence. [Citations.]" (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1747.)

An appellate court can only reject evidence accepted by the trier of fact when the evidence is inherently improbable and impossible of belief. (*People v. Maxwell* (1979) 94 Cal.App.3d 562, 577.) Except in the case of physical impossibility or inherent improbability, the testimony of a single witness is sufficient to support a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) To warrant the rejection, on this ground, of testimony given by a witness who has been believed by the trier of fact, "there must exist either a physical impossibility that [the witness's statements] are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.]" (*People v. Huston* (1943) 21 Cal.2d 690, 693, overruled on another ground in *People v. Burton* (1961) 55 Cal.2d 328, 352; accord, *People v. Thompson* (2010) 49 Cal.4th 79, 124.) "To be improbable on its face the evidence must assert that something has occurred that it does not seem possible could have occurred under the circumstances disclosed.

The improbability must be apparent; evidence which is unusual or inconsistent is not necessarily improbable. [Citations.]" (*People v. Headlee* (1941) 18 Cal.2d 266, 267-268.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

Appellant contends Edward's identification testimony is improbable on its face because, both immediately after the theft and at trial, Edward described the perpetrator as clean-cut and clean-shaven. However, appellant's booking photograph, taken within a few hours of the incident, shows appellant with a goatee, and he was described by the jailer as having a goatee.

The reporter's transcript shows that Angel described the perpetrator as being "right on [Edward's] face," meaning the two were face-to-face and close to each other. When asked at trial whether his assailant had any beard or facial hair at all, Edward replied, "I do not remember it." Asked if it was fair to say that the person did not have a goatee, Edward replied, "No, he did not." When describing the person to Officer Wilson shortly after the incident, Edward said he was clean-shaven. However, the April 11, 2008, booking photograph of appellant, which was admitted into evidence and which we have viewed, shows appellant with visible hair on his chin and possibly the beginning of a mustache. Appellant was arrested at approximately 1:00 a.m. on April 11, 2008; however, he was not immediately taken to the Kern County jail (where it appears the booking photograph was taken, since the exhibit states on its face that it is a record of the Kern County Sheriff's Department), but instead was booked into the Delano City jail first and then later transferred to the Kern County system.[14]

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[14] Respondent notes, in his factual summary, that Officer Wilson testified that appellant did not have a goatee when he was arrested on April 11. Wilson testified that he knew this because he looked at the booking photograph from Delano prior to

Having closely examined the pertinent testimony and especially appellant's booking photograph, we conclude Edward's identification of appellant as the perpetrator is neither physically impossible nor inherently improbable. The booking photograph was taken the day after the robbery, but we do not know how many hours had elapsed. The robbery occurred around 7:00 p.m. on April 10, appellant was arrested around 1:00 a.m. on April 11, and the photograph was taken sometime after he was processed at the Delano jail and transferred to the Kern County jail. The record contains no information as to how quickly appellant's facial hair grows, or anything to suggest it could not have become more apparent during the interval between the robbery and when the photograph was taken.

More importantly, the facial hair shown in the photograph is not so heavy that it could not possibly have been overlooked by a frightened victim, even one that was face-to-face with the perpetrator. The robbery occurred around dusk, when the lighting inferentially was not as bright as in the photograph.[15] Jurors reasonably could have rejected Shomer's apparent assumption that either the scene was bright enough to see all details or the light was so poor as to affect the accuracy of an identification, and could have concluded there was adequate light to permit Edward to make an accurate description and identification of his assailant, but not necessarily to clearly see all details of his appearance. In addition, it appears from the booking photograph (in which appellant's chin seems to be raised slightly) that the facial hair was most visible along the

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testifying. Although the record is not entirely clear, it appears Wilson looked at an earlier booking photograph, not one taken at the time of appellant's arrest in this case. It also appears that when appellant was processed at the Delano jail in conjunction with the present case, the jailer described his appearance as unkempt and wrote, with respect to facial hair, that appellant had a goatee.

[15] When asked at trial to describe the lighting, Edward testified, "There was still light out, it was going into the dark though."

bottom of appellant's chin. The hair is neither so thick nor so long that a change in head angle would have no effect on visibility.

"Weaknesses and inconsistencies in eyewitness testimony are matters solely for the jury to evaluate." (*People v. Allen* (1985) 165 Cal.App.3d 616, 623, overruled on another ground in *People v. Berry* (1993) 17 Cal.App.4th 332, 338-339.) Here, the claimed problems with Edward's testimony were appropriately argued to the trier of fact (see *People v. Echevarria* (1992) 11 Cal.App.4th 444, 453), and are not of such a nature as to render Edward's identification of appellant physically impossible or inherently incredible (see *People v. Thompson, supra,* 49 Cal.4th at pp. 124-125; *People v. Arias, supra,* 13 Cal.4th at pp. 168-169). This being the case, Edward's testimony constituted sufficient evidence to sustain appellant's convictions.

C. Jury Instructions

1. Background

Appellant requested that the court give special instruction No. 7, a modified version of CALCRIM No. 315 that told jurors what questions they should consider in evaluating identification testimony. The court agreed to do so, but deleted the portions that would have instructed jurors to consider the following:

- "[H]ow many persons did [the witness] view before making the identification[?]"
- "[W]as the identification procedure a reliable one[?]"
- "[W]as any photographic lineup used free of influences from other sources[?]"
- "[W]ere there any discrepancies in the description of the suspect given by the eye witness compared with the description of the defendant[?]" and
- "[W]as an identification tainted by a previous misidentification[?]"

Defense counsel complained that the court had deleted everything she had added to the standard instruction, and she argued that the questions she requested were relevant to a determination of whether the eyewitness identification was correct. She asserted that, for example, asking whether the witness was able to identify the defendant in a

photographic or physical lineup, without asking whether the identification process used was a reliable one, focused attention on the evidence for the prosecution and ignored the evidence for the defense. She also specifically complained about inclusion of the question how certain was the witness when he made the identification, since Shomer testified, without contradiction, that certainty is not correlated with accuracy. She asked the court to modify that factor to ask "what significance, if any, is the degree of certainty of the identification[?]" The court responded that it was up to the jury to accept or reject the expert's opinion, and that adding the requested factors to the instruction would almost be saying that the court accepted the expert's testimony. The court refused, but offered to instruct that jurors could consider the expert's opinion if they found it to be reliable, thus allowing the defense to argue that opinion to the jury. Defense counsel asked the court to so instruct.

As given, the instruction told jurors:

> "You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony.
>
> "In evaluating the identification testimony, consider the following questions:
>
> "Did the witness know or have contact with the defendant before the event;
>
> "How well could the witness see the perpetrator;
>
> "What were the circumstances affecting the witness'[s] ability to observe, such as lighting, weather conditions, obstructions, distance, and duration of observation;
>
> "How closely was the witness paying attention;
>
> "Was the witness under stress when he or she made the observation;
>
> "Did the witness give a description and how does that description compare to the defendant;

"How much time passed between the event and the time when the witness identified the defendant;

"Was the witness asked to pick the perpetrator out of a group;

"Did the witness ever fail to identify the defendant;

"Did the witness ever change his or her mind about the identification;

"How certain was the witness when he or she made the identification;

"Were there any other circumstances affecting the witness'[s] ability to make an accurate identification;

"You may consider an expert's opinion if you find it reliable;

"Was the witness able to identify other participants in the crime;

"Was the witness able to identify the defendant in a photographic or physical lineup.

"The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crimes. If the People have not met this burden, you must find that the defendant is not guilty."

Appellant now contends the trial court erred by refusing to modify CALCRIM No. 315 as requested by defense counsel. He says the requested additions "enumerated relevant factors bearing on the evaluation of eyewitness testimony that were raised by the trial evidence," and were either framed in a neutral manner or easily could have been rewritten to make them neutral. He further says the trial court's refusal to include the requested factors had the "pernicious" effect of implying it did not accept much of the expert's testimony, and he claims the prejudice was exacerbated by the conflict between the trial court's modification of CALCRIM No. 315 and CALCRIM No. 332. Last, appellant asks this court to excise the witness certainty factor from CALCRIM No. 315.

2. Analysis

A trial court has no sua sponte duty to instruct a jury on the evaluation of eyewitness identification evidence. (*People v. Alcala* (1992) 4 Cal.4th 742, 802-803 [discussing CALJIC No. 2.92, the counterpart of CALCRIM No. 315].) However, "[a] criminal defendant is entitled, on request, to an instruction 'pinpointing' the theory of his defense. [Citations.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 570.) Thus, "CALJIC No. 2.92 or a comparable instruction should be given when requested in a case in which identification is a crucial issue and there is no substantial corroborative evidence. [Citation.]" (*People v. Wright* (1988) 45 Cal.3d 1126, 1144 (*Wright*).

Here, the trial court gave CALCRIM No. 315. As written, the instruction provides a blank space for the inclusion of any factual circumstances relevant to eyewitness identification that are not addressed in the list of standard factors contained in the instruction. (Commentary to CALCRIM No. 315 (2009-2010) p. 91.) Because CALCRIM No. 315 is a pinpoint instruction, it stands to reason that any factors added to it must be germane to the case in light of the evidence adduced at trial, and must adhere to the rules applicable to pinpoint instructions. "In a proper instruction, '[w]hat is pinpointed is not specific evidence as such, but the *theory* of the defendant's case.' [Citation.]" (*Wright, supra*, 45 Cal.3d at p. 1137.) "[A] proper instruction on eyewitness identification factors should focus the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence." (*Id.* at p. 1141.) "The court must, however, refuse an argumentative instruction, that is, an instruction 'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) An explanation of the effects of the various eyewitness identification factors "'is best left to argument by counsel, cross-examination of the eyewitnesses, and expert testimony

where appropriate.' [Citation.]" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1110, quoting *Wright, supra,* 45 Cal.3d at p. 1143.)

It appears the trial court was concerned about seeming to endorse a particular psychological theory concerning the reliability of eyewitness identifications or to adopt the views of the defense expert. An instruction that had such an effect "would improperly invade the domain of the jury, and confuse the roles of expert witnesses and the judge." (*Wright, supra,* 45 Cal.3d at p. 1141.) Expert testimony is not binding on the jury, of course; jurors remain free to completely reject the expert's testimony, and so "an instruction incorporating a particular expert's opinion would deprive the jury of its independence in judging the weight to be given to such expert opinion." (*Id*. at pp. 1142-1143.)

Appellant says that, to the extent any of his requested factors ran afoul of this principle or were argumentative, the trial court should have tailored them to meet neutrality requirements rather than deleting them altogether. (See *People v. Fudge, supra,* 7 Cal.4th at p. 1110 [to extent proposed instruction was argumentative, trial court should have tailored it to conform to requirements of *Wright* rather than denying it altogether]; but see *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 99 [trial court may properly refuse requested instruction that is argumentative; *People v. Danielson* (1992) 3 Cal.4th 691, 717 [same], overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

We need not decide whether appellant's proposed factors were argumentative or would have somehow invaded the jury's domain and implied the trial court's acceptance of Shomer's testimony, because we conclude they were adequately covered by the instruction as given. Where the proposed instructions "largely duplicate[] those that were actually given," a trial court does "not err in refusing to give the additional instructions offered by [the] defendant. [Citations.]" (*People v. Danielson, supra,* 3 Cal.4th at p. 717; accord, *People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 99.) Although the

factors instructed upon by the trial court perhaps did not make appellant's points as expressly as appellant would have liked, appellant was free to argue those points, and did so at length. We do not find the eyewitness identification instruction given in this case to have been inadequate or improper in any material aspect. (See *People v. Frank* (1990) 51 Cal.3d 718, 739.) Appellant's proffered additional factors thus were properly refused, regardless of the correctness of the trial court's reasoning. (See *People v. Wharton, supra,* 53 Cal.3d at p. 571.)

Moreover, even assuming one or more additional factors should have been included in CALCRIM No. 315, such error is judged under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, i.e., whether it is reasonably probable a result more favorable to appellant would have been reached absent the error. (*Wright, supra,* 45 Cal.3d at p. 1144.) When considered with the other instructions the jury received, CALCRIM No. 315 did not improperly limit the factors the jury could consider in evaluating eyewitness identification testimony. (See *People v. Felix* (2008) 160 Cal.App.4th 849, 858-859.) As noted, appellant argued what he viewed as the relevant factors to the jury at length, and the jury was expressly told it could consider an expert's opinion. The various factors were amply addressed by Shomer in his testimony. Under the circumstances, appellant has failed to establish prejudice. (See *People v. Fudge, supra,* 7 Cal.4th at pp. 1110-1112; *Wight, supra,* 45 Cal.3d at pp. 1144-1145 & fn. 16; *People v. Felix* (1993) 14 Cal.App.4th 997, 1009.)

Appellant says, however, that the trial court inclusion, in CALCRIM No. 315, of the statement, "You *may consider* an expert's opinion *if* you find it reliable" (italics added), conflicted with CALCRIM No. 332, the standard instruction on expert testimony. Pursuant to CALCRIM No. 332, jurors were told, in pertinent part: "Witnesses were allowed to testify as experts and to give expert opinions in this trial. You *must consider* the opinions but you *are not required* to accept them as true or correct. The meaning and

importance of any opinion are for you to decide.… You *may disregard* any opinion that you find unbelievable, unreasonable or unsupported by the evidence." (Italics added.)

As a practical matter, we see no real difference in effect between the two instructions. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." (*Boyde v. California* (1990) 494 U.S. 370, 380-381.)

Were we to find conflicting or ambiguous instructions, moreover, we would nevertheless find no cause for reversal. When reviewing such instructions, "we inquire whether the jury was 'reasonably likely' to have construed them in a manner that violates the defendant's rights. [Citation.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 873; accord, *Estelle v. McGuire* (1991) 502 U.S. 62, 72.) Here, appellant failed to request any clarification of the pertinent portion of either instruction. Assuming he did not thereby forfeit his claim of error on appeal (see *People v. Young*, *supra*, 34 Cal.4th at p. 1202), we find no reasonable likelihood the jury misunderstood and misapplied the instructions. It is not reasonably likely jurors could have failed to understand that they were free to accept or reject expert testimony and opinions, and that they could take Shomer's testimony into account in assessing the reliability of eyewitness identification testimony. We find no shifting of the burden to appellant to prove that Shomer's opinion was reliable or concomitant lightening of the prosecution's burden by requiring the jury to consider the gang expert's opinion. We further reject the notion that the trial court's refusal to modify CALCRIM No. 315 as requested somehow implied it did not accept much of Shomer's testimony.

Last, appellant asks us to excise the certainty factor from CALCRIM No. 315, because, he says, there is no correlation between confidence in an identification and the

identification's accuracy. He says it is wrong to acknowledge the lack of correlation between certainty and accuracy, as this court did in *People v. Jimenez* (2008) 165 Cal.App.4th 75, 82, while nevertheless instructing jurors to consider certainty.

In *Neil v. Biggers*, *supra*, 409 U.S. at page 199, the United States Supreme Court included the level of certainty as a proper factor to be considered in evaluating the likelihood of misidentification. Our state Supreme Court expressly approved of CALJIC No. 2.92, which includes a certainty factor. (*People v. Wright, supra*, 45 Cal.3d at p. 1144; see *People v. Sullivan* (2007) 151 Cal.App.4th 524, 561-562.) That court also rejected a claim that the trial court erred in including the factor where, as here, the expert testified without contradiction that a witness's confidence in an identification does not correlate with the accuracy of that identification. (*People v. Johnson, supra*, 3 Cal.4th at pp. 1231-1232.) The high court explained that the jury remained free to reject the expert's testimony even though it was uncontradicted, and that the instructions permitted jurors to infer the witness's positive identification was not necessarily accurate if they were persuaded by the expert's testimony. (*Ibid*.)

We decline to excise the certainty factor from CALCRIM No. 315. Significantly, the factor is neutrally phrased ("How certain was the witness when he or she made an identification?") so that it applies not only when the witness was certain of the identification, but also when he or she was *not* certain. Whatever the lack of positive correlation between certainty and accuracy, we are aware of nothing that suggests *lack* of certainty may not indicate *lack* of accuracy.

We do not go so far as to say a trial court automatically commits error by removing the factor. Whether such a modification of the standard instruction is erroneous necessarily will depend upon the evidence presented in a particular case. A trial court is under no sua sponte duty to modify the instruction, however (*People v. Ward* (2005) 36 Cal.4th 186, 213-214), and here, defense counsel did not request complete excision of the certainty factor. Were we to find error in the trial court's failure to

modify the certainty factor as appellant requested, we would find it harmless: Shomer testified to the lack of correlation between certainty and accuracy, CALCRIM No. 315 expressly permitted consideration of this testimony, and appellant strongly attacked the accuracy of the eyewitness identifications. Under these circumstances, it is not reasonably probable appellant would have obtained a more favorable result absent the alleged error. (See *People v. Ward, supra,* at p. 214.)

II

OTHER EVIDENTIARY ISSUES

A. MySpace Page

1. Background

At the outset of trial, an Evidence Code section 402 hearing was held at which the prosecution's gang expert, Detective Nicholson, testified. Nicholson described an incident in which two gang members stole beer from a convenience store and were then dropped off at a party for the gang that was being held that the home of Veronica Avila, appellant's girlfriend, and at which appellant was present. Nicholson related that he could show Avila associated with the same gang, had the gang nickname "Tweety," and that gang members commonly provide alibis for other gang members. The trial court ruled that Nicholson could testify that those who stole the beer went to Avila's residence, but not that Avila was a gang member. The prosecutor then asked Nicholson whether he had found any other information regarding Avila. Nicholson responded that he had found a MySpace web page under her name, and that the web page contained her photograph, along with words and numbers indicative of her membership in the gang. The trial court ruled that as things stood, the evidence was not to come in and the incident with the beer was to be described without identifying Avila as a gang member. It warned, however, that if Avila took the stand and "open[ed] the door," that would be a different situation.

When Nicholson testified about the beer run in front of the jury, he mentioned that Avila was present at the house, but said nothing about her being a gang member. Avila

subsequently provided appellant with an alibi for the time of the robbery. On cross-examination, the prosecutor was permitted to elicit, over defense objection, Avila's denial that she was a gang member or a member of Southside Delano. When he then asked her if she had ever had a MySpace page, Avila responded, "There is – well, you could say there's a MySpace page under my name. But usually they made it, like people I don't know, people got my pictures, my information, they made a MySpace page of me where they talk a lot about bad things about me." Avila then identified exhibit 12, a printout of a MySpace page, as bearing a photograph of her and an old friend. Under the photograph was the written description "Female, 18 years old, SUR SID3, D3lano, California. United States." Avila testified that she was indeed 18 years old, but she denied writing the description. She explained, "I tried to erase this because it has my information. But I can't control, I don't have control over it. Because, as you can tell, they write bad things about me. So I wanted to get – erase it, but I just can't control it because none of the information matches like me. And whatever is in the computer, it don't match. There is no matching to it, so I can't control it, it is not me controlling. [¶] … [¶] It is not MySpace, it is somebody that has MySpace under my name." She further pointed out that she lived in McFarland, not Delano. She also testified that it said "h00dRAT" at the top of the page, and that she would not put that if it was her MySpace page.

Defense counsel subsequently objected to exhibit 12 based on lack of foundation that Avila authorized it. The prosecutor responded that it bore a photograph of her and contained her pertinent information; hence, it was up to the trier of fact to determine whether it was indeed Avila's MySpace page. He asserted that a proper foundation was laid "as for that web page being on the web site and it being of her …." The court found sufficient foundation, but admitted the exhibit only for the limited purpose of impeaching Avila's credibility, and offered to so instruct the jury. Defense counsel asked the court to further instruct jurors that they could only consider the exhibit if they found Avila authorized the information. The court refused, but stated defense counsel could argue the

point. Defense counsel again asserted there was no foundation, in that it was unclear where the exhibit came from, and who produced it and why. Counsel noted that it was not even a complete page, as part had been cut off or deleted, and she objected to the court telling jurors they could use it for impeachment. The court gave counsel the option of having the document admitted with or without a limiting instruction. Counsel chose to have no instruction given, claiming it would be "like telling them not to think about pink elephants."

In his summation, the prosecutor suggested to jurors that the alibi witnesses were loved ones, in a sense, of appellant, and that if a person's loved one was in jail and the person had a way to get him out, the person would tell someone. Appellant's witnesses did not do anything, however. The prosecutor then stated: "I mean, if you wanted to use circumstantial evidence there is [*sic*] females in the car, the description of the people in the car, it could be the people that got on the stand today." Defense counsel objected that the prosecutor was "inviting the jury to speculate." The court responded, "I will sustain it, I think." The prosecutor proceeded to argue to the jury that the reason the witnesses did not seek out and tell the police was because they did not know where appellant was at the time of the incident.

Appellant now contends the MySpace page should have been excluded as having no evidentiary value because it was not authenticated. He says the trial court compounded the error by refusing to instruct the jury that it could consider the evidence only if it found Avila authorized the information on it. Last, he says the erroneous admission of the exhibit, coupled with the denial of the requested instruction and the prosecutor's related improper argument, was prejudicial. Respondent concedes the trial court erred by not giving the requested instruction, but says the exhibit was properly authenticated and the instructional error was harmless.

2. Analysis

Only relevant evidence is admissible. (Evid. Code, § 350; *People v. Lucas* (1995) 12 Cal.4th 415, 466.) A writing is relevant only if it is shown to be authentic, since, without proof of authenticity, the writing has no tendency in reason to prove or disprove a fact at issue in the case. (*People v. Beckley* (2010) 185 Cal.App.4th 509, 518; *Poland v. Department of Motor Vehicles* (1995) 34 Cal.App.4th 1128, 1135; see Evid. Code, § 210.)[16] "'[I]n some legal systems it is assumed that documents are what they purport to be, unless shown to be otherwise. With us it is the other way around.'" (*McAllister v. George* (1977) 73 Cal.App.3d 258, 262.) Accordingly, authentication of a writing is required before either the writing or secondary evidence of its content may be received into evidence. (Evid. Code, § 1401.) "Authentication of a writing means (1) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (*Id.*, § 1400.) "Circumstantial evidence, content and location are all valid means of authentication [citations]." (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383.)

"When, as here, the relevance of proffered evidence depends upon the existence of a foundational fact, the proffered evidence is inadmissible unless the trial court determines it 'is sufficient to permit the jury to find the preliminary fact true by a preponderance of the evidence.' [Citations.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 165; Evid. Code, § 403, subd. (a)(1).) "In other words … there [must] be sufficient evidence to enable a reasonable jury to conclude that it is more probable that the fact

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16 The MySpace exhibit at issue here constitutes a "writing" under the Evidence Code. (Evid. Code, § 250; *People v. Beckley, supra*, 185 Cal.App.4th at p. 514.) Although a printout necessarily was used at trial, it is presumed to be an accurate representation of the web page Nicholson found on the Internet. (Evid. Code, § 1552, subd. (a); *People v. Beckley, supra*, 185 Cal.App.4th at p. 517.)

exists than it does not. [Citations.]" (*People v. Herrera* (2000) 83 Cal.App.4th 46, 61.) "The court should exclude the proffered evidence only if the 'showing of preliminary facts is too weak to support a favorable determination by the jury.' [Citations.]" (*People v. Lucas, supra,* 12 Cal.4th at p. 466.) "As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility. [Citations.]" (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321 & cases cited.) A trial court's ruling on the sufficiency of the foundational evidence is reviewed for abuse of discretion (*People v. Tafoya, supra,* 42 Cal.4th at p. 165; *People v. Lucas, supra,* 12 Cal.4th at p. 466), keeping in mind, of course, that the court has no discretion to admit irrelevant evidence (Evid. Code, § 350; *People v. Poggi* (1988) 45 Cal.3d 306, 323).

In the present case, Avila herself authenticated the photograph on the MySpace page, testifying that it was a picture of her and her friend. (See *People v. Doggett* (1948) 83 Cal.App.2d 405, 409-410.) She also conceded that she was the age stated on the web page. Beyond that, however, she denied any connection to, or control over, the MySpace page in general and, specifically, the gang-related writing that made the MySpace page probative of issues in the case. No witness was called to testify, from his or her personal knowledge, that Avila was responsible for the web page or its contents, and there was no expert or other testimony from which it could be inferred that it would be unlikely that anyone but Avila could create a MySpace page bearing Avila's name and photograph. (See *People v. Beckley, supra,* 185 Cal.App.4th at pp. 515-516 [recognizing that anyone can put anything on Internet and that hackers can adulterate any website]; compare *People v. Gibson, supra,* 90 Cal.App.4th at p. 383 [manuscripts were adequately authenticated where they contained clear references to author being one of defendant's aliases, evidence showed defendant was operating as madam and manuscripts discussed prostitution business, manuscripts were seized from defendant's residences, and no evidence showed they belonged to anyone else]; *People v. Olguin* (1994) 31 Cal.App.4th

1355, 1372-1373 [handwritten rap lyrics were adequately authenticated when they were found in search of defendant's home, referred to composer by defendant's gang moniker, included references to membership in gang of which defendant was a member, and could be interpreted as referring to the type of part-time employment maintained by defendant].)

Under the circumstances, a finding that the writing was authentic was necessarily based on speculation. Accordingly, the trial court should either have excluded the MySpace exhibit or instructed the jury to disregard it. (Evid. Code, § 403, subds. (b) & (c)(2); *People v. Lucas, supra,* 12 Cal.4th at pp. 467-468; *People v. Price* (1991) 1 Cal.4th 324, 423-424.) Nevertheless, we conclude it is not reasonably probable appellant would have obtained a more favorable result absent the error. (See *People v. Lucas, supra,* 12 Cal.4th at p. 468 [applying *Watson* test]; *People v. Beckley, supra,* 185 Cal.App.4th at p. 517 [same].)[17] Avila's credibility was already suspect in light of her relationship with appellant and her presence at a party held at her house at which gang members were also present. In addition, two of her brothers also provided alibi testimony on appellant's behalf. Finally, we do not view Edward's identification of appellant as being as troublesome as appellant would have us find.[18]

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[17] In *People v. Jimenez, supra,* 165 Cal.App.4th at pages 81-82, we applied the harmless-beyond-a-reasonable-doubt test applicable to federal constitutional error, finding the erroneous admission of DNA evidence with an inadequate chain of custody to be so prejudicial as to have rendered the defendant's trial fundamentally unfair and, thus, a violation of due process. The nature of the erroneously admitted evidence is much different in the present case, however, and we find no due process violation.

[18] In light of our conclusion that admission of the MySpace exhibit constituted harmless error, we need not address the trial court's refusal to instruct the jury that it could consider the exhibit only if it found Avila authorized the information on it. We note, however, that when a court admits evidence under Evidence Code section 403, the court "[m]ay, *and on request shall*, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist." (Evid. Code, § 403, subd. (c)(1), italics added.) "[T]his

Appellant says, however, that the prejudice was exacerbated by the prosecutor's improper invitation to the jury to speculate that Avila could have been one of the females in the green car at the time of the robbery. He concedes that the trial court sustained defense counsel's objection to the argument, but says the court did not do so with conviction.

"'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion – and on the same ground – the defendant made an assignment of misconduct *and requested that the jury be admonished to disregard the impropriety*.' [Citation.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 259, italics added.) Although here defense counsel made a timely objection, she did not request an admonition. Because an admonition would have cured any prejudice, appellant cannot raise this claim on appeal. (*Id*. at pp. 259-260; accord, *People v. Stanley* (2006) 39 Cal.4th 913, 952.) In any event, the offending remark was brief and mild, the sustaining of the objection demonstrated to the jury that the argument was improper, the prosecutor immediately proceeded to argue inferences that reasonably could be drawn from the evidence, and jurors were instructed that the statements of the attorneys were not evidence. The prosecutor's conduct neither infected the trial with unfairness nor rendered it reasonably probable a result more favorable to appellant would have occurred absent the remark. (See *People v. Hawthorne* (2009) 46 Cal.4th 67, 90; *People v. Welch* (1999) 20 Cal.4th 701, 753.)

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provision makes it discretionary for the trial court to give an instruction regarding a preliminary fact *unless* the party makes a request." (*People v. Lewis* (2001) 26 Cal.4th 334, 362, italics added.) As respondent concedes, appellant's requested instruction should have been given.

B. Gang Expert's Testimony

1. Background

Nicholson's expert testimony on gangs is summarized in the statement of facts, *ante*. At the conclusion of direct examination, he opined that, on April 10, 2008, appellant was a member of the Sureno criminal street gang. The prosecutor then gave a series of hypothetical questions based on the facts as shown by the prosecution's evidence, and asked the significance to whether a person was an active participant in a criminal street gang, whether the robbery was committed for the benefit of or in furtherance of the Sureno criminal street gang , and how such a crime would promote or assist other gang members in further criminal conduct. In his answers, Nicholson expressly based his opinions on the testimony he had heard in addition to everything he had reviewed. He referred to the victim as being a suspected rival gang member, to the robbery as being committed in broad daylight and in the presence not only of the victims but also of other people in the area who saw the crime, and to the perpetrators as having shouted "Delano Southside" as they fled the scene.

Appellant now contends Nicholson's opinion testimony impermissibly invaded the province of the jury, because it was not about the culture and habits of criminal street gangs and how they relate to the expectations of gang members in general when confronted with a particular action in a hypothetical situation, but instead Nicholson testified about the specific events that occurred on April 10, 2008. Appellant further says the testimony was not rooted in the facts of the case, because no evidence other than Nicholson's testimony suggested the crime was committed in broad daylight in front of people other than the victims, that the suspects shouted anything about a gang, or that the suspects knew or suspected Edward was a rival gang member. Appellant concludes that Nicholson's testimony did no more than inform the jury how he believed the case should be decided and lacked a proper foundation; hence, it was improperly admitted. Moreover, it did not provide any substantial support for the gang enhancement allegation.

Since there was no other evidence sufficient to support a true finding on the allegation, the argument runs, the section 186.22, subdivision (b) enhancement must be reversed due to insufficiency of the evidence.

2. Analysis

"'A witness is qualified to testify about a matter calling for an expert opinion if his peculiar skill, training, or experience enable him to form an opinion that will be useful to the jury.' [Citation.] The question becomes whether the expert opinion given was helpful to the trier of fact.… Even though facts may be within the knowledge or understanding of the trier of fact, the conclusions to be drawn therefrom may require expert testimony. [Citations.] '"The decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' [Citation.]" (*People v. Harvey* (1991) 233 Cal.App.3d 1206, 1226-1227; Evid. Code, § 801, subd. (a).)

"[T]he decision of a trial court to admit expert testimony 'will not be disturbed on appeal unless a manifest abuse of discretion is shown.' [Citation.]" (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299.) "'In general, where a gang enhancement is alleged, expert testimony concerning the culture, habits, and psychology of gangs is permissible because these subjects are 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' [Citations.]" (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506; accord, *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) An expert may also testify concerning the gang membership of particular individuals. (*People v. Valdez, supra*, at p. 506.)

Appellant does not challenge these standard rules or the admission of the gang expert's testimony in general, but instead says Nicholson's testimony exceeded the scope

of what is proper, because (1) Nicholson invaded the province of the jury and improperly testified regarding the specific events of this case, and (2) his testimony was not rooted in the facts as shown by the evidence. (See, e.g., *People v. Richardson* (2008) 43 Cal.4th 959, 1008 [expert may render opinion on basis of facts given in hypothetical question; such question must be rooted in facts shown by the evidence, and expert's opinion may not be based on assumptions of fact without evidentiary support]; *People v. Gonzalez, supra,* 38 Cal.4th at p. 947, fn. 3 [recognizing difference between testifying about specific persons and about hypothetical persons; expert witness may be questioned through use of hypothetical questions regarding hypothetical persons]; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658-659 [improper for expert to testify to individual's subjective knowledge and intent; such opinion did nothing more than inform jury how expert believed case should be decided]; see also *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1182-1183 [notwithstanding Evid. Code, § 805, which permits otherwise admissible opinion testimony to embrace ultimate issue to be decided by trier of fact, expert must not usurp function of jury].) At trial, however, appellant failed to object on any of these grounds. He thereby forfeited the claims for purposes of appeal. (Evid. Code, § 353, subd. (a); *People v. Lindberg* (2008) 45 Cal.4th 1, 48; *People v. Coffman and Marlow, supra,* 34 Cal.4th at pp. 81-82; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1207-1208; *People v. Flores* (1992) 7 Cal.App.4th 1350, 1359-1360.)

The question remains whether the evidence was sufficient to sustain the jury's true finding on the section 186.22, subdivision (b) enhancement. In making this determination, we apply the same standards set out in conjunction with our review of the robbery conviction, *ante* (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 996), and we take into account Nicholson's testimony that was received without objection (*People v. Bailey* (1991) 1 Cal.App.4th 459, 463).

To establish the gang enhancement under section 186.22, subdivision (b), "the prosecution must prove that the crime for which the defendant was convicted had been

'committed for the benefit of, at the direction of, or in association with any criminal street gang, [and that it was committed] with the specific intent to promote, further, or assist in any criminal conduct by gang members.' [Citations.]" (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 616-617.)[19] In the present case, Edward testified that there was more than one perpetrator, and that one or more of them said a gang name as they were leaving the scene of the robbery. In our view, the saying of a gang name by the perpetrator or perpetrators under the circumstances here is sufficient to establish, at one fell swoop, both disputed elements of the gang enhancement. Nicholson's testimony was not necessary for the jury to infer the crime was gang related; instead, it helped explain the significance of some of the circumstances. To the extent it may have gone beyond the trial evidence, jurors were free to take that into account in determining whether to accept Nicholson's opinions and, if so, how much weight to give them.[20]

It has been stated that an expert's testimony alone is not sufficient to find that an offense is gang related. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 931.) Here, however, it was coupled with other evidence from which jurors reasonably could infer the necessary relationship and intent. (Compare, e.g., *People v. Margarejo* (2008) 162 Cal.App.4th 102, 109-110 [sufficient evidence to support gang enhancement where,

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[19] The prosecution must also prove "that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a 'pattern of criminal activity' by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period. [Citation.]" (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 617, italics omitted.) Since the parties stipulated that Surenos are a criminal street gang under the statute, we need not concern ourselves with these elements.

[20] Jurors were instructed, in part, to consider the facts or information on which the expert relied in reaching an opinion and to decide whether the information on which the expert relied was true and accurate, and that they could disregard any opinion they found to be unsupported by the evidence.

during commission of underlying crime of evading police, defendant made gang signs to non-gang pedestrians during chase] with *People v. Ochoa* (2009) 179 Cal.App.4th 650, 661-663 [evidence did not sustain expert's inference carjacking was gang related where defendant did not call out gang name, display gang signs, wear gang clothing, or engage in gang graffiti while committing offense; expert's testimony carjacking could benefit gang was based on speculation, not evidence].) The evidence here was sufficient to sustain the section 186.22, subdivision (b) enhancement.

Appellant relies on *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099 (*Garcia*), in which the Ninth Circuit Court of Appeals found insufficient evidence to support the jury's finding of the specific intent required under section 186.22, subdivision (b), namely, "the intent to 'promote, further, or assist in' *other criminal activity of the gang apart from the robbery of conviction*." (*Garcia*, *supra*, at pp. 1100-1101, italics added; see also *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069, 1079-1083.) We decline to follow *Garcia*. In our view, it misinterprets the statute, which, by its language, requires a showing of specific intent to promote, further, or assist in "*any* criminal conduct by gang members" (italics added), rather than "other" criminal conduct. (*People v. Vazquez* (2009) 178 Cal.App.4th 347, 353-354; *People v. Hill* (2006) 142 Cal.App.4th 770, 773-774; *People v. Romero* (2006) 140 Cal.App.4th 15, 19-20.)

III

NEW TRIAL MOTION AND INEFFECTIVE ASSISTANCE OF COUNSEL

A. Background

Following his conviction, appellant moved for a new trial on various grounds, including newly discovered evidence. In her supporting declaration, defense counsel stated that prior to trial, the defense had no reason to believe any other witnesses saw the robbery, and, when interviewed by the defense investigator, Edward's mother did not mention other witnesses. The defense investigator was not allowed to speak to the children; insofar as shown in police reports concerning the incident, the children made no

mention of other witnesses. While testifying during trial, however, Edward's mother stated for the first time that there were other witnesses at the scene. As soon as practicable, the defense investigator attempted to locate the witnesses and discovered an additional, material witness, Tyler G. Defense counsel asserted that Tyler's testimony was capable of raising a reasonable doubt as to whether this was a gang offense, and was also capable of calling into question the accuracy of the victims' identification of appellant as the robber.[21]

In his supporting declaration, Tyler related that on April 10, 2008, he and some younger family members were outside his home on 19th Avenue. It was starting to get dark. He saw a green car pass by. It had four or five people in it. When it stopped 90 feet from where he was standing, a couple of Mexican males with black sweatshirts got out.[22] Their heads were shaved. They had medium complexions, and the driver had a mustache. They pushed another person off a bicycle. A little girl who was with this person fell down. One of the people from the car picked up the bicycle and threw it in the trunk of the car, which then drove south on York Street. The only thing Tyler heard the people in the car say was, "'let's go!'" He did not hear anything gang related.

The People opposed the motion, asserting that the witness could easily have been located prior to trial. Hence, the defense did not use due diligence in discovering the evidence.

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21 Abel Hernandez, the defense investigator, also submitted a declaration, confirming that the police reports and witness statements gave no information concerning any witnesses to the robbery other than Edward and his two companions. Edward's mother initially agreed to permit Hernandez to interview the children, but subsequently changed her mind. Upon learning of her trial testimony, Hernandez canvassed the areas near the crime scene and the victim's residence and discovered Tyler G., a minor.

22 Tyler's declaration relates that the distance was measured as 90 feet. Although the declaration does not state who took the measurement, it was not disputed.

At the hearing on the motion, defense counsel asserted that her office (the public defender's office) handled a large volume of cases and did not have the manpower to canvass neighborhoods in every case unless there was some indication there were witnesses. There was no such notice in this case, except with respect to Edward and his two companions. As soon as Edward's mother testified, however, the defense started looking for the other witnesses. Although the defense investigator was unable to locate the witness about whom Edward's mother testified, he did find Tyler. In response to the prosecutor's lack-of-diligence argument, defense counsel stated that if the court felt the public defender's office was not diligent, then there was an issue of ineffective assistance of counsel. The trial court denied the motion for a new trial without stating its reasons.

Appellant now points to the trial court's statement to defense counsel ("What the court has looked at in this case is whether or not there was due diligence obviously and also several other issues ….") as indicating the court denied the motion on that ground. Appellant says the trial court's "strict enforcement" of the diligence requirement constituted an abuse of discretion, and also denied appellant his constitutional right to fundamental fairness. Alternatively, he argues that if defense counsel's lack of diligence resulted in the loss of important exculpatory evidence, then she did not render effective assistance of counsel.

B. <u>Analysis</u>

"'"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citations.]" (*People v. Turner* (1994) 8 Cal.4th 137, 212, overruled on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5; see also *People v. McDaniel* (1976) 16 Cal.3d 156, 177.) Thus, there is a strong presumption the trial court properly exercised its discretion (*People v. Davis* (1995) 10 Cal.4th 463, 524), and these rules apply where, as here, the basis for such a motion is newly discovered evidence (*People v. Greenwood* (1957) 47 Cal.2d 819, 821). In

determining whether there has been a proper exercise of discretion, "each case must be examined on its own facts [citation], recognizing that the trial court is in the best position to determine the genuineness and effectiveness of the showing in support of the motion [citation]." (*People v. Minnick* (1989) 214 Cal.App.3d 1478, 1481; accord, *People v. Turner, supra,* 8 Cal.4th at p. 212; *People v. Hill* (1969) 70 Cal.2d 678, 698.)

Pursuant to subdivision 8 of section 1181, a court may grant a new trial "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." A motion for a new trial made on this ground is looked upon with disfavor. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 485.)

The requisite showing is well settled:

> "'To entitle a party to a new trial on the ground of newly discovered evidence, it must appear, – "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits."'" (*People v. Martinez* (1984) 36 Cal.3d 816, 821.)

A motion for new trial "'should be granted when the newly discovered evidence contradicts the strongest evidence introduced against the defendant ….'" (*People v. Delgado* (1993) 5 Cal.4th 312, 329.) Newly discovered evidence that merely impeaches or discredits a witness does not compel the granting of a new trial. (*People v. Moten* (1962) 207 Cal.App.2d 692, 698; accord, *People v. Trujillo* (1977) 67 Cal.App.3d 547, 556; *People v. Maldonado* (1963) 221 Cal.App.2d 128, 135.) However, a new trial "'should undoubtedly be granted where the showing is such as to make it apparent to the trial court that the defendant has, without fault on his part, not had a fair trial on the merits, and that by reason of the newly discovered evidence the result would probably be, or should be, different on a retrial.'" (*People v. Love* (1959) 51 Cal.2d 751, 757.) The

test of whether a different result in retrial is reasonable probable "is not a subjective one whether a particular trier of fact would be persuaded by the new evidence to reach a different conclusion, but rather is an objective one based on all the evidence, old and new, whether any second trier of fact, court or jury, would probably reach a different result." (*People v. Huskins* (1966) 245 Cal.App.2d 859, 862.)

Here, the purportedly new evidence consisted of Tyler G.'s testimony. We find the trial court did not abuse its discretion by denying appellant's motion for a new trial based thereon, nor did the court's ruling result in a denial of appellant's right to a fair trial.

First, we question whether the defense met the "reasonable diligence" requirement. As the court explained in *People v. Williams* (1962) 57 Cal.2d 263, 273:

> "Concededly one who relies upon the ground of newly discovered evidence to sustain his motion for a new trial 'must have made reasonable effort to produce all his evidence at the trial, and … he will not be allowed a new trial for the purpose of introducing evidence known to him and obtainable at the time of trial, or which would have been known to him had he simply exercised reasonable effort to present his defense.' [Citations.] But it must also be recognized that 'despite the exercise of such effort, cases will sometimes occur where, after trial, new evidence most material to the issues, and which would probably have produced a different result, is discovered. It is for such cases that the remedy of a motion for a new trial on the ground of newly discovered evidence has been given.' [Citation.]
>
> "The term 'diligence' is 'incapable of exact definition because it is a relative term' [citation] and the 'diligence' of defendant in marshaling his evidence for the trial must be determined in the light of the 'peculiar circumstances' involved. [Citation.]"

In the present case, given the time of day at which events occurred, it would have been reasonable for defense counsel to assume there might have been witnesses besides Edward and his companions, and to have her investigator conduct at least a brief canvass of the neighborhood. Moreover, counsel did not ask for any kind of continuance, once there was testimony about a woman who saw the perpetrators' vehicle, to seek out that

witness, and it is not clear whether the search for witnesses began as soon as that testimony was given. We are mindful of the impact increasing caseloads and concomitant budget cuts have had on public defenders' offices, but cannot allow these factors to impinge upon a criminal defendant's rights to a fair trial and the effective assistance of counsel.

Regardless, the requirement of diligence must not be used "to sustain an erroneous judgment imposing criminal penalties on the defendant as a way of punishing defense counsel's lack of diligence." (*People v. Martinez, supra,* 36 Cal.3d at p. 825, fn. omitted.) Rather, "[t]he focus of the trial court … should be on the significance and impact of the newly discovered evidence, not upon the failings of counsel or whether counsel's lack of diligence was so unjustifiable that it fell below constitutional standards.… If consideration of the newly discovered evidence is essential to a fair trial and a just verdict, the court should be able to grant a new trial without condemning trial counsel as constitutionally ineffective." (*Id.* at p. 826.) When the defense presents newly discovered evidence that would probably lead to a different result at retrial, "[r]eliance upon counsel's lack of diligence to bar defendant from presenting that evidence to a trier of fact would work a manifest miscarriage of justice." (*Ibid.*)

Accordingly, we consider whether the evidence set out in Tyler's declaration was such as to render a different result probable on retrial. We conclude it was not. At most, it would have impeached Edward's description of the perpetrator's clothing and Nicholson's assumption that the gang name was shouted. Tyler's description of the perpetrators as Mexican males with medium complexions and shaved heads is consistent with Edward's testimony; the fact Tyler described the driver as having a mustache, but did not mention facial hair on the other person, is of virtually no import since, even assuming appellant's facial hair was the same as depicted in his booking photograph, his goatee is not so heavy that it reasonably could be expected to be visible at dusk from a distance of 90 feet. Similarly, the fact Tyler heard "let's go," but no gang-related

statement, does not assist appellant; Edward never said the gang name was shouted or even exclaimed loudly, as an exhortation to one's partners in crime to flee might be. Although Nicholson assumed it was shouted, jurors were well aware he was not present during the robbery, and had no basis upon which to credit his recollection of testimony over Edward's recollection of the actual events.

Since we conclude the new trial motion was properly denied without regard to the issue of diligence, appellant's related claim of ineffective assistance of counsel is moot.[23]

IV

CUMULATIVE PREJUDICE

Appellant contends that this was a close case that "rested so precariously on questionable identification evidence" that the "cumulative and synergistic effect" of the purported errors requires reversal. (See *People v. Holt* (1984) 37 Cal.3d 436, 459.) Contrary to appellant's assertion, the few errors found or assumed were not prejudicial, whether considered individually or cumulatively.

V

SENTENCING ERROR

A. Background

Following appellant's conviction, the probation officer recommended imposition of a 12-year prison term on count 1, calculated as the lower term of two years for the robbery plus a consecutive 10-year term for the gang enhancement. It was further

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[23] Were we to find deficient performance based on lack of diligence, we would find no reasonable probability appellant would have obtained a more favorable result absent counsel's shortcomings. (See *In re Thomas* (2006) 37 Cal.4th 1249, 1265.) Because both deficient performance and prejudice must be shown in order to secure reversal of a conviction upon the ground of ineffective assistance of counsel (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003), we would further find no cause for reversal.

recommended that the 16-month lower term be imposed for count 2, then stayed pursuant to section 654.

The sentencing hearing took place on January 6, 2009. The trial court expressed concern over the recommended sentence in light of the fact appellant was 18 years old and had pushed a person off a bicycle, and announced a tentative disposition of probation with local custody. The court stated that it had looked closely at appellant's criminal activity and could find only one prior offense, a juvenile petition for which appellant spent 10 days in juvenile hall in December 2007. The court noted that the probation officer's report (RPO) listed, as the circumstance in mitigation, that appellant had a minimal prior record, and as the circumstance in aggravation, that he was on juvenile probation for that offense. The court stated that it was considering not only appellant's age, but also the facts of the case. It made clear that it was not condoning bicycle theft, but questioned giving appellant 12 years in prison under the circumstances.

After further argument, in which the prosecutor vehemently opposed anything less than the recommended prison sentence, the court found in mitigation that appellant had a minimal prior criminal record, and, in aggravation, that he was on juvenile probation when the present crimes were committed. The court then suspended imposition of sentence and admitted appellant to probation for five years on various terms and conditions, including that he serve a year in jail, report to the probation officer within five days of his release from custody, and not associate with gang members during the period of probation.

On April 29, 2009, appellant was released from jail. On May 1, he reported to probation and signed written terms and conditions of probation that included the nonassociation condition. On May 2, he was arrested for conspiracy to commit a crime (§ 182, subd. (a)(1)) and contributing to the delinquency of a minor (§ 272). Ultimately, revocation of probation was sought on the ground that appellant violated the nonassociation condition.

Defense counsel's motion to have the contested revocation hearing heard by the trial judge was denied. Evidence presented at the hearing showed that appellant reported to his probation officer on May 1, 2009, and acknowledged the nonassociation condition of probation. The next day, Delano Police Officer Felix pulled over a car with three occupants. Appellant was the rear seat passenger. The other two occupants were gang members. Testifying again as the prosecution's gang expert, Detective Nicholson opined that appellant and the vehicle's other occupants belonged to the same gang, and members of that gang knew one another. The gang had between 10 and 50 members; Nicholson had never spoken to a member and referred to another member whom the first member did not know. Although Nicholson conceded he had no evidence that appellant had met the vehicle's other two occupants prior to May 2, the three did have common associates prior to that date.

Appellant testified that he lived in Delano and had to go to Bakersfield to meet with the probation officer on May 1. Because he had no transportation, his uncle gave him a ride. After meeting with the probation officer, appellant spent the night at his uncle's house. The next day, appellant's uncle had to work and so could not take appellant back to Delano. Instead, he called someone to give appellant a ride. Appellant did not know either person in the vehicle was a gang member. He had not met either of them before.

The court found appellant's testimony not credible, and concluded he was in violation of the nonassociation condition of his probation. Accordingly, the court revoked appellant's probation. At sentencing, the prosecutor argued that appellant should be sentenced to prison. Defense counsel asked that he be reinstated on probation and ordered to serve the approximately 174 days left of the original year. This ensued:

> "[THE COURT:] All right. Well, this is a very difficult conundrum that we are in here, a very difficult situation, difficult for the reasons that Judge Etcheverry [the trial judge], who wrestled with it, and I say he wrestled with it, because there is little middle ground in this case. There is

just little middle ground. *Either the defendant gets felony probation and no more than a year in the county jail at his original sentencing or he gets the minimal amount of time in prison under the law, which was 12 years*. That is simply a situation that is difficult, and then you take the presumptions against probation if you are talking about robbery.… [¶] … [¶]

"We have an 18-year-old kid at the time that this occurred and at the time of the original sentencing, and he is certainly not much older than that. He can't be any older than 19. [¶] … [¶]

"This was a crime, that is to say the stealing of the bicycle. The robbery of the bicycle was a crime that was clearly done in the jury's mind for the benefit of a criminal street gang ….

"So we have every parent's nightmare. We have our young people walking by a park of all things, being accosted by a group of young men in a vehicle in broad daylight in a public place adjacent to a public park and a brazen robbery occurs that is gang related.

"The district attorney at the time of sentencing … said this is a battle for control of the streets.…

"And this illustrates why the legislature and the People have said you are going to do a crime that is for the benefit of a criminal street gang, then we are going to fight back and *we are going to impose extremely serious penalties for that kind of conduct*.

"We now bring ourselves to the issue of whether – well, there is a violation, but what is the nature of the violation and how does it play into what the Court should do? Because I want – it is very clear in my mind that I understood totally where Judge Etcheverry was coming from when he passed the sentence, and the sentencing record reflects why he did what he did.… He gave this young man the opportunity, the opportunity because of his youth, because of his relative lack of a criminal record, because of all of the family members and friends who supported him and who left, I'm sure, the impression as it left me, that this is a young man who is loved by his family, who is a loving young man himself, and he said we are not going to throw this man away without giving him a chance, and he gave him that chance.… [¶] … [¶]

"You put a person on probation, judges do it to control their conduct, and in reading the defendant's statement that was just handed to me today, the defendant does not accept that he did anything wrong ….

> "I … read with interest the comment that was submitted in the statement of mitigation …. [']Granting probation in this case is consistent with California Rules of Court Rule 4.414(b)(8). This rule states that the following is a criteria affecting probation. The likelihood that if not imprisoned the defendant will be a danger to others. The defendant is not likely to be a danger to others if granted probation.… He will know that association with gang members would be a violation of probation that would cause him to go to prison for 12 years.[']
>
> "The print is not even fresh on the probation officer's directives to the defendant when the defendant is in the car …. [¶] … [¶]
>
> "Controlling behavior – controlling association … is extremely important in gang cases. The defendant may think that his actions were totally innocent. I just needed a ride. My buddies were going to give me a ride. That is not the way it works. The Court has an obligation to see that that conduct of association is separated from the defendant's conduct.
>
> "For the reasons I have indicated, I'm going to follow the recommendation.
>
> "Probation is revoked, and the defendant is sentenced to the Department of Corrections for the law term of two years, said sentenced to be enhanced by ten years pursuant to section 186.22(b)(1) of the Penal Code, for a total fixed term of 12 years …." (Italics added.)

Appellant now contends that a remand for resentencing is necessary, because the sentencing court was unaware it had discretion to strike the gang enhancement. Further, he says, the judge who presided over the trial should be the one to resentence appellant. Respondent says this court lacks jurisdiction to review the claim on appeal because appellant failed to file a notice of appeal following imposition of sentence. On the merits, respondent says the record fails to demonstrate that the sentencing court was unaware of its discretion.

B. <u>Analysis</u>

1. <u>Appealability</u>

Except under circumstances not present here, a defendant may appeal from a final judgment of conviction. (§ 1237, subd. (a).) A sentence and an order granting probation

are deemed to be final judgments for this purpose. (*Ibid*.) Generally speaking, a notice of appeal must be filed within 60 days after the rendition of the judgment or the making of the order being appealed, and no court can extend the time in which to file a notice of appeal. (Cal. Rules of Court,[24] rule 8.308(a).)

"A timely notice of appeal, as a general matter, is 'essential to appellate jurisdiction.' [Citation.] It largely divests the superior court of jurisdiction and vests it in the Court of Appeal. [Citation.] An untimely notice of appeal is 'wholly ineffectual: The delay cannot be waived, it cannot be cured by nunc pro tunc order, and the appellate court has no power to give relief, but must dismiss the appeal on motion or on its own motion.' [Citation.] The purpose of the requirement of a timely notice of appeal is, self-evidently, to further the finality of judgments by causing the defendant to take an appeal expeditiously or not at all." (*People v. Mendez* (1999) 19 Cal.4th 1084, 1094; see also *In re Jordan* (1992) 4 Cal.4th 116, 121; rule 8.60(d).)

Insofar as the record shows, appellant did not file a notice of appeal following the revocation of probation and imposition of sentence. He did, however, file a timely notice of appeal following the grant of probation. Under the unusual circumstances of this case, we will deem the appeal from the sentence to be subsumed in the original notice of appeal. (See rule 8.304(a)(4) [notice of appeal must be liberally construed]; rule 8.308(c) [reviewing court may treat premature notice of appeal as filed immediately after making of order]; see also *People v. Hollis* (1959) 176 Cal.App.2d 92, 94.) We do so because to do otherwise would constitute a waste of scarce judicial resources and would not promote justice. The necessary record is already before us pursuant to rule 8.340(a). While respondent has appropriately raised the appealability issue (although with citation only to civil cases), he has had a full opportunity to address appellant's claim of error on the merits, and has done so. It is almost certain that appellant relied on defense counsel to

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24 Further references to rules are to the California Rules of Court.

file a notice of appeal from the imposition of sentence.[25] Making appellant jump through the hoops of filing a petition for writ of habeas corpus seeking relief from default, on the ground either that defense counsel rendered ineffective assistance by failing to file the required notice or that the superior court clerk received but lost the notice, would achieve nothing but unwarranted delay in the face of what, we will explain, is a meritorious issue, and the unnecessary processing of two cases instead of one. (See, e.g., *In re Anthony J.* (2004) 117 Cal.App.4th 718, 721-722 [defendant was denied effective assistance of counsel by defense counsel's failure to file appeal from judgment; ineffective assistance was prejudicial where defendant sought to raise meritorious issue]; *People v. Djekich* (1991) 229 Cal.App.3d 1213, 1219 [since habeas corpus can be used to review validity of sentence or order of probation that can be corrected without redetermination of questions of fact, appellate court would treat matter as habeas petition in interests of judicial economy and efficiency]; *People v. Snyder* (1990) 218 Cal.App.3d 480, 491-492 [under limited and unusual circumstances, doctrine of constructive filing permits appeal to be prosecuted even though notice was not filed within 60-day time limit; delayed filings should be permitted where slavish adherence to deadlines would violate more basic justice and where cause of delayed filing was not principally attributable to fault of appellant], disapproved on another ground in *People v. DeLouize* (2004) 32 Cal.4th 1223, 1233, fn. 4.)

2. Trial court's misunderstanding of scope of its discretion

A trial court has discretion to strike a gang enhancement "where the interests of justice would best be served." (§ 186.22, subd. (g); *People v. Sinclair* (2008) 166 Cal.App.4th 848, 855.) An abuse of discretion occurs where the court was not aware, or

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25 Whether the sentencing court's cursory statement to appellant, "You have 60 days in which to appeal," constitutes a sufficient advisement of appeal rights is an issue we need not address as the case now stands.

misunderstood the scope, of its discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 378; *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8; *People v. Marquez* (1983) 143 Cal.App.3d 797, 803.)

Respondent says the record does not demonstrate that the sentencing court was unaware of its discretion to strike the gang enhancement under section 186.22, subdivision (g). We agree with respondent that where the record is silent, the trial court will be presumed to have understood and correctly applied the law. (See, e.g., *People v. Carmony*, *supra*, 33 Cal.4th at p. 378; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228-1229.) We do not agree, however, that the record here is silent. Nothing in the RPO, the request for revocation of probation and recommendation, or the argument of counsel suggested the gang enhancement could be stricken. Significantly, and as shown in the italicized portions of our quotation from the sentencing court, *ante*, that court believed there was no middle ground between the grant of probation with a year in jail or 12 years in prison, either at the time of the initial sentencing hearing before Judge Etcheverry or as mandated by the Legislature and the electorate. Nothing in the record suggests the court did not continue incorrectly to believe there was no middle ground with respect to the decision before it.[26] (See *People v. Myers* (1983) 148 Cal.App.3d 699, 704.)

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[26] It appears the sentencing court may even have been unclear regarding its broader sentencing options and the differences between a situation in which the imposition of sentence was suspended and one in which judgment was pronounced but the execution of sentence was suspended. The court stated: "[A]t the original sentencing the judge did not apparently address Count 2; so I'm not sure that I have any jurisdiction to address Count 2 at this time. It was not addressed originally." Plainly, it was not addressed by the trial court because imposition of sentence was suspended. "If the imposition of a sentence is to be suspended during a period of probation after a conviction by trial, the trial judge must identify and state circumstances that would justify imposition of one of the three authorized prison terms referred to in section 1170(b) if probation is later revoked." (Rule 4.433(b).) The trial court did so here, expressly finding and identifying one factor in mitigation and one in aggravation. Once probation was revoked, it then fell

We cannot say the circumstances would not support striking the gang enhancement pursuant to section 186.22, subdivision (g) (see *People v. Torres* (2008) 163 Cal.App.4th 1420, 1426, 1433), nor does the record support a conclusion the sentencing court would not have stricken the enhancement had it been aware of its discretion (see *People v. Rivas* (2004) 119 Cal.App.4th 565, 574-575).[27] Indeed, the RPO stated that a lower sentence could be justified. Since we cannot say the error was harmless (i*d*. at p. 575), "remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.]" (*People v. Brown, supra,* 147 Cal.App.4th at p. 1228.)

Because "[t]he decision to revoke probation does not trigger automatic consequences" (*People v. Jones* (1990) 224 Cal.App.3d 1309, 1315), the court will have the option to reinstate probation on the same or modified terms (if this is a situation in which modification of the terms is possible under the law), or to terminate probation and commit appellant to prison (*ibid*.; *People v. Pennington* (1989) 213 Cal.App.3d 173, 176.)[28] If the latter, the court must decide whether to strike the gang enhancement pursuant to section 186.22, subdivision (g). (See rule 4.435(b)(1).)

Although we will remand the matter for resentencing, we will not order the case returned to the trial judge. Appellant remains free to ask the sentencing court to transfer the hearing (see *People v. Borousk* (1972) 24 Cal.App.3d 147, 162), but, under the

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to the sentencing court to pronounce judgment on both counts. (§ 1203.2, subd. (c); *People v. White* (1982) 133 Cal.App.3d 677, 681; see *People v. Howard* (1997) 16 Cal.4th 1081, 1087.)

27 We are not sure what to make of the sentencing court's reference to the presumptions against probation where robbery is concerned. According to the RPO, there were no statutory provisions limiting or prohibiting a grant of probation in this case.

28 We do not mean to suggest the court cannot again impose the 12-year prison term. Nevertheless, the probation officer and counsel should be prepared to give the court all available options.

circumstances of this case, there is no requirement that the sentencing court grant the request (compare *People v. Martinez* (2005) 127 Cal.App.4th 1156, 1159-1160 & *People v. Cole* (1960) 177 Cal.App.2d 458, 460 with *People v. Strunk* (1995) 31 Cal.App.4th 265, 275).

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated and the matter is remanded for resentencing in accordance with the views expressed in this opinion.

_____
Ardaiz, P.J.

WE CONCUR:

_____
Wiseman, J.

_____
Levy, J.